STATE OF MICHIGAN

COURT OF APPEALS

M.G. PERRY CONSTRUCTION COMPANY,

Plaintiff/Counter-Defendant,

v

RICHARD OLIVER,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

v

MICHAEL G. PERRY,

Third-Party Defendant/Appellee.

UNPUBLISHED
May 23, 2006

No. 265791
Wayne Circuit Court
LC No. 03-319258-CK

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Richard Oliver appeals the trial court's grant of summary disposition to Michael Perry, and we affirm.

I. Facts and Procedural History

Michael Perry owned and operated M.G. Perry Construction Company (Perry Construction), a residential building company. On February 20, 2002, Michael Perry, on behalf of Perry Construction, signed a contract with Richard Oliver to build an $887,000 custom home for Mr. Oliver in Grosse Ile. Disputes arose during construction of the home and, at one point, Oliver hired an inspector from The Assurance Company to inspect the house for workmanship problems. Oliver also hired Soil and Materials Engineers, Inc. (SME) to examine the brickwork. According to Oliver, both companies found that the house had brick and foundation problems.

Efforts to resolve these disputes were not successful and, on June 13, 2003, Perry Construction filed a complaint against Oliver in Wayne Circuit Court. According to Perry Construction, it completed approximately 70 percent of the construction but, on or about June 7, 2003, Oliver changed the locks on the house and refused to allow Perry Construction to complete the job. Perry Construction further asserted that Oliver failed to pay $126,360.50 under the contract. A month later, Oliver filed a "counter-complaint and third-party complaint" against

Perry Construction and Michael Perry, individually. Oliver alleged that Michael Perry (Perry) misrepresented that Perry Construction would build the home according to prevailing workmanship standards, the building code, and the plans and specifications. Oliver specifically cited foundation and brick problems on the house. The complaint states that, after Oliver also noticed problems with the interior of the house, he stopped the next payment to Perry in November 2002.

Oliver's complaint also asserts that Oliver and Perry entered another agreement, signed on December 9, 2002, in which Oliver agreed to continue payments for construction and Perry agreed to fix the problems "to Richard Oliver's satisfaction." According to Oliver, Perry did not fix the brick and foundation problems and he suffered damages as a result. To that end, Oliver asserted numerous claims against Perry Construction and he also asserted claims against Perry, in his individual capacity, for fraud and silent fraud. The trial court granted summary disposition to Perry on Oliver's fraud claims, but ultimately entered a default judgment against Perry Construction for $768,257. Oliver appeals the trial court's grant of summary disposition to Perry.

II. Analysis

The trial court granted summary disposition to Perry because it ruled that any promise Perry made was pursuant to the underlying construction contract and that, therefore, Oliver's claims sound in contract, not in tort. We affirm the trial court's grant of summary disposition, but for reasons different than those articulated by the trial court. Oliver argued an exception to the rule that fraud may not be predicated on an existing contract or on a promise of future conduct. However, analyzed under that exception, Oliver's claim fails because he presented insufficient evidence to establish a triable issue of fact.[1]

---

[1] The trial court did not identify on which court rule it relied when it granted summary disposition to Perry. However, the opinion indicates that the trial court considered evidence outside of the pleadings and, therefore, the trial court based its ruling on MCR 2.116(C)(10). "This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). As our Supreme Court explained in *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden*, *supra* at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

"The elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005). This Court has held that "fraud must be established by clear and convincing evidence . . . ." *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1997). "However, fraud may be established by circumstantial evidence." *Id*. (Emphasis deleted.)

Oliver contends that Perry made a fraudulent misrepresentation in the December 9, 2002 repair agreement. The agreement states, in its entirety:

> Richard Oliver agrees to continue to honor the contract between Richard Oliver and the MG Perry Construction Company provided that Michael Perry and the MG Perry Construction Company resolve the exterior brick, foundation, and other problems with the house to Richard Oliver's satisfaction. In addition to resolving these problems to Richard Oliver's satisfaction, Michael Perry and the MG Perry Construction Company agree to extend the warranty on the house to seven years, to honor all implied warranties, and to resume construction on the house by Friday, December 13, 2002.

The repair agreement relates to a promise of future conduct because it contemplates that Perry would undertake to make repairs after the agreement was signed. Such promises are contractual and, thus, do not generally form the basis of an allegation of fraud. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378; 689 NW2d 145 (2004). However, the *Derderian* Court further explained at 378-379:

> An exception to this rule exists, however, if a promise is made in bad faith without the intention to perform it. *Hi-Way Motor* [*v Int'l Harvester Co*, 398 Mich 330, 337-338; 247 NW2d 813 (1976)]. "[E]vidence of fraudulent intent, to come within the exception, must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.' " *Id*. at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930). Plaintiffs, therefore, must demonstrate that at the time defendants made promises to them, defendants did not intend to fulfill the promises.

Oliver maintains that Perry's conduct falls within the above exception. Specifically, Oliver asserts that Perry never intended to resolve the problems with the house to "Oliver's satisfaction" because he admittedly did not intend to follow the recommendations of The Assurance Company and SME.

Oliver failed to present evidence to establish that, at the time the parties signed the agreement, Perry, in bad faith, did not intend to make repairs to Oliver's satisfaction. Oliver is correct that Perry testified that he did not agree with The Assurance Company or SME's assessment of the house and that he was not willing to make the repairs as recommended by either company. However, this, standing alone, does not establish a misrepresentation about his intent to make repairs to "Oliver's satisfaction." Oliver's argument presumes that the only way

he would be "satisfied" is if Perry made the repairs as recommended by the two companies. His position also presumes that Perry *knew* that Oliver would only be satisfied if Perry followed The Assurance Company and SME's recommendations and that, in bad faith, he agreed to do so while knowing he would not. Oliver's argument fails because no evidence establishes that those presumptions were, indeed, true at the time the parties entered the repair agreement.

According to Perry's testimony, he believed that the problems Oliver experienced occurred because the house was unfinished and that, when construction was complete, the problems would be resolved through normal construction practices. He also testified that he fully intended to make sure that Oliver was satisfied with the construction and he submitted an email that reflects his intention to work with Oliver to repair the brick and foundation cracks.

While some evidence raises a credibility issue with regard to whether Perry intended to comply with *SME's* demands, it does not establish that Perry did not intend to make repairs to *Oliver's* satisfaction. To the contrary, the email clearly states Perry's *willingness* to make sure Oliver would be satisfied with the construction. Thus, any fact question that the evidence raises about Perry and SME is irrelevant.

Oliver states that, "[i]n February of 2003, because of Perry's refusal to fix the house's problems, . . . Oliver stopped payment of the next scheduled draw." Oliver states that Perry then stopped working on the house. However, there is no evidence that, between the time Perry promised to fix the problems to Oliver's satisfaction on December 9, 2002, and when Oliver stopped payments under the construction agreement in February 2003, that Perry "refused" to make the repairs. To the contrary, Perry's email indicates that, even after Oliver stopped making payments, Perry was appealing to Oliver to work together to resolve his concerns about the brick and foundation. Accordingly, Oliver has simply failed to present evidence to establish that Perry misrepresented his intent to make the repairs.[2]

---

[2] Oliver relies on three older decisions to support his claims, *Rutan v Straehly*, 289 Mich 341; 286 NW 639 (1939), *Ainscough v O'Shaughnessey*, 346 Mich 307; 78 NW2d 209 (1956), and *People's Furniture & Appliance Co v Healy*, 365 Mich 522; 113 NW2d 802 (1962). All of the cases are easily distinguishable. In *Rutan*, the plaintiff entrusted the defendant with her money for investment purposes. The defendant stated that he invested the money in certain notes. However, evidence established that the defendant never invested the plaintiff's money in the notes and, to the extent any money was owed under the notes, they were uncollectible. *Rutan* clearly involved a knowing intent to deceive that is simply not at issue here.

Similarly in *Ainscough*, the defendant car dealer intentionally changed a term of an auto sales agreement by penciling in a notation that the plaintiff would be paid $807.47 for his trade-in, rather than the agreed-upon $1,225.94. Our Supreme Court observed that "[w]hen the circumstances surrounding a particular transaction are such as to require the giving of information, a deliberate and intentional failure to do so may properly be regarded as fraudulent in character." *Ainscough, supra* at 316. Again, however, there is no evidence here that Perry deliberately or intentionally failed to give Oliver information or that he secretly changed the terms of the agreement after it was signed.

(continued…)

This case rests on a fundamental disagreement about the nature and extent of the foundation and brick problems with the house. On the basis of The Assurance Company and SME's investigations, Oliver became convinced that the house has severe structural problems that could not be fixed with normal construction practices as Perry completed the house. Evidence established that Perry acknowledged that there were brick and basement cracking problems, but it does not appear Perry agreed that, for example, the house was sinking in the organic, compressible soil. Perry submitted affidavits from two structural engineers who stated that (1) any cracks were not caused by foundational problems, but by natural concrete shrinkage and (2) any brick problems are cosmetic and can be easily repaired. Perry also submitted a December 3, 2003 affidavit of the Grosse Ile building inspector, Richard Sligay, who initially found no building code violations. At a later point during litigation, however, Sligay appears to have changed his mind: On May 7, 2004, Sligay filed a report with the Michigan Bureau of Commercial Services that cites nine methods of construction that constitute violations of the Michigan Residential Building Code, including Perry's failure to install base flashing in the brick veneer and construction on organic, compressible soil.

Nonetheless, we cannot conclude that, as of December 9, 2002, Perry intentionally misled Oliver about his plan to make repairs to "Oliver's satisfaction." As of that date, all evidence shows that the parties continued to discuss the nature and extent of the repairs and Perry's conduct around that time shows his intent to work with Oliver to make certain that Oliver was satisfied with the end result. Again, as of December 2002, Perry did not promise to repair everything suggested by The Assurance Company or SME or that he would make the repairs according to their instructions. Accordingly, Perry did not misrepresent his planned future conduct and the trial court correctly granted summary disposition to Perry.[3]

(…continued)

In *People's Furniture*, the defendant real estate agent told the plaintiff buyer that a warehouse did not have flooding problems or that there was only a slight chance of flooding problems. Relying on that statement, the plaintiff made a $5,000 deposit on the property, but later learned that the risk of flooding was higher than the defendant claimed. Our Supreme Court concluded that the plaintiff could maintain a cause of action for fraud because, "[w]here one knows that the other party is guided by his statements, an action for fraud will lie, even though the representation or statement is with regard to future or contingent events." *People's Furniture, supra* at 525. The Court concluded that, under these circumstances, it is a question of fact whether the property was, indeed, at risk of flooding. As with the other cases cited by Oliver, *People's Furniture* is distinguishable. Here, Perry did not misrepresent an existing or future fact about the condition of the house. Rather, Perry assured Oliver that he intended to make repairs to Oliver's satisfaction and there is no evidence that Perry made that assurance in bad faith or with insufficient knowledge.

[3] Oliver makes the cursory assertion that Perry should also be held liable for altering allowances, in violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Specifically, Oliver asserts that Perry changed the written contract allowances and, in essence, attempted to double charge for cabinets and plumbing fixtures. According to Oliver, because the trial court permitted the MCPA claim against Perry Construction to go forward, Perry may also be held individually liable for an MCPA violation under *Hartman & Eichorn Building Co, Inc v*

(continued…)

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder

(…continued)

Dailey, 266 Mich App 545; 701 NW2d 749 (2005). Oliver is correct that, in *Hartman*, this Court ruled that individuals, and not just their businesses, may be liable for conduct that violates the MCPA. However, as Perry points out, Oliver did not assert an MCPA claim against Perry individually and, as to Perry, this issue was not raised in or decided by the trial court. Accordingly, we reject this claim as unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).